(2)

JAN 3 - 2005

No. 04-702

IN THE
Supreme Court of the United States

SALIM AHMED HAMDAN,
Petitioner,

v.

DONALD H. RUMSFELD, ET AL.,
Respondents.

On Petition for Writ of Certiorari Before Judgment to the United States Court Of Appeals For The District Of Columbia Circuit

---

REPLY BRIEF FOR PETITIONER

Lieutenant Commander
Charles Swift
Office of
Military Commissions
1931 Jefferson Davis Hwy.
Suite 103
Arlington, VA 22202
(703) 607-1521

Neal K. Katyal
Counsel of Record
600 New Jersey Ave., NW
Washington, DC 20001
(202) 662-9000

Benjamin S. Sharp
Harry H. Schneider
Joseph M. McMillan
Kelly A. Cameron
Charles C. Sipos
David R. East
PERKINS COIE LLP
607 14th St., NW
Washington, DC 20005
(202) 628-6600

Date: January 3, 2005

WILSON-EPES PRINTING CO., INC. – (202) 789-0096 – WASHINGTON, D. C. 20001

TABLE OF CONTENTS

Reply Brief of Petitioner.....1
Reply Appendix A, *Order Holding Hicks* v. *Bush (D.D.C.) in Abeyance* (Dec. 15, 2004).....Reply App. 1
Reply Appendix B, *Order Holding Al Qosi* v. *Bush (D.D.C.) in Abeyance* (Dec. 17, 2004).....Reply App. 3

TABLE OF AUTHORITIES

Cases

Asakura v. *City of Seattle*, 265 U.S. 332 (1924).....8
Ashwander v. *TVA*, 297 U.S. 288 (1936).....9
Clinton v. *City of New York*, 524 U.S. 417 (1998).....8
Clinton v. *Jones*, 520 U.S. 681 (1997).....8
Crawford v. *Washington*, 124 S.Ct. 1354 (2004).....10
Doe v. *Braden*, 57 U.S. 635 (1853).....8
Ex Parte Milligan, 71 U.S. (4 Wall.) 2 (1866).....4, 6
Ex parte Quirin, 317 U.S. 1 (1942).....passim
Hamdi v. *Rumsfeld*, 124 S.Ct. 2633 (2004).....passim
In re Grimley, 107 U.S. 147 (1890).....3
In re Yamashita, 327 U.S. 1 (1946).....4
Jordan v. *Tashiro*, 278 U.S. 123 (1928).....8
Kolovrat v. *Oregon*, 366 U.S. 187 (1961).....8
Madsen v. *Kinsella*, 343 U.S. 341 (1952).....4
Mathews v. *Eldridge*, 424 U.S. 319 (1976).....4
Ogbudimka v. *Ashcroft*, 342 F.3d 207 (C.A.3 2003).....9
Rasul v. *Bush*, 124 S.Ct. 2686 (2004).....4, 6, 8
Reid v. *Covert*, 354 U.S. 1 (1957).....4
Rodriguez de Quijas v. *Shearson/American Express, Inc.*, 490 U.S. 477 (1989).....4
Schlesinger v. *Councilman*, 420 U.S. 738 (1975).....3, 4, 5, 6
Solorio v. *United States*, 483 U.S. 435 (1987).....7
Spencer v. *Kemna*, 523 U.S. 1 (1998).....5
Teague v. *Lane*, 489 U.S. 288 (1989).....6
The Head Money Cases, 112 U.S. 580 (1884).....8
United States v. *Percheman*, 32 U.S. (7 Pet.) 51 (1833).....8

Younger v. *Harris*, 401 U.S. 37 (1971) 3

Statutes

10 U.S.C. §818 5
28 U.S.C. §1254(1) 2
28 U.S.C. §2101(e) 2

Other Authorities

Amicus Br. of Noah Feldman, in Hamdan v. Rumsfeld, No. 04-5393 (C.A.D.C.) 10
Bittker, *The World War II German Saboteurs' Case and Writs of Certiorari Before Judgment by the Court of Appeals*, 14 Const. Comment. 431 (1997) 3
Chief Justice Burger, Annual Report on the State of the Judiciary, 62 A.B.A. J. 443 (1976) 10
Danelski, *The Saboteurs' Case*, 1 J. S. Ct. Hist. 61 (1996) 3
Golden, *After Terror, A Secret Rewriting of Military Law*, N.Y. Times, Oct. 24, 2004, at 1 6
Neil Lewis, *Fresh Details Emerge on Harsh Methods at Guantanamo*, N.Y. TIMES, Jan. 1, 2005, at A11 2
Robert L. Stern, et al., Supreme Court Practice (8th ed 2002) 7
Special Defense Department Briefing on Status of Military Tribunals, Dec. 20, 2004, at http://www.defenselink.mil/transcripts/2004/tr200412 20-1841.html 7
Tr. of Oral Argument, *Rumsfeld* v. *Padilla*, No. 03-1027 2
U.S. Br. Opp., *Hamdi* v. *Rumsfeld*, No. 03-6696 4
U.S. Br. Opp., *Rasul* v. *Bush* and *Al Odah* v. *United States*, Nos. 03-334 and 03-343 4

Treatises

William Winthrop, *Military Law and Precedents* (2d ed. 1920) 9

Regulations

32 C.F.R. §9.5(p) 5

IN THE

Supreme Court of the United States

SALIM AHMED HAMDAN,
Petitioner,

v.

DONALD H. RUMSFELD, ET AL.,
Respondents.

On Petition for Writ of Certiorari Before Judgment to the United States Court Of Appeals For The District Of Columbia Circuit

---

REPLY BRIEF FOR PETITIONER

---

1. The need for certiorari before judgment is even more compelling now than when the Petition was filed.

Although briefing in the Court of Appeals will be completed by January 10, 2005, the Court of Appeals has announced that it will not hear oral argument until March 8, 2005, two months from now. Any opposition to certiorari before judgment based on the Court of Appeals' "expedited" treatment of this case must therefore fail.

Moreover, the two other District Court Judges with pending military-commission cases recently stayed them to await the outcome of this case. Reply App. 1-4. As a result, the entire commission process, and all pending challenges to it, have ground to a halt. Every commission defendant now sits at Guantanamo awaiting final resolution of the exceptionally important questions presented in this case.

The proper disposition of this Petition boils down to one question: Does the benefit of having the views of one Circuit Court outweigh the need for prompt, final resolution by this Court? In this unique case, involving pure questions of law, the need for prompt and final resolution eclipses the value of intermediate appellate guidance.

2. It seems probable that the Court will decide – sooner or later – the legality of the military commission process challenged in this case. The process was established without Congressional guidance and fails to provide what has long been understood to be required by the Constitution, international law, military law, and the common law. The issue would appear to be not whether, but when, the Court will grant review. Respondents agree that the questions are exceptionally important and warrant swift resolution (Pet. App. 49-52), as do many *amici*.[1] This case will affect the well-being of Americans and other individuals from around the world who have been or may be captured in armed conflicts.

The real-world need for this Court's review regarding the Executive's legal interpretations is manifest. *Compare, e.g.*, Tr. of Oral Argument at 22-23, *Rumsfeld* v. *Padilla*, No. 03-1027 (Question: "Suppose the executive says, `Mild torture, we think, will help get this information?'...Some systems do that to get information." Answer "Well, our executive doesn't") *with, e.g.*, Neil Lewis, *Fresh Details Emerge on Harsh Methods at Guantanamo*, N.Y. TIMES, Jan. 1, 2005, at A11 ("While all the detainees were threatened with harsh tactics if they did not cooperate, about one in six were eventually subjected to those procedures, one former interrogator estimated. The interrogator said that when new interrogators arrived they were told they had great flexibility in extracting information from detainees because the Geneva Conventions did not apply at the base.").

The questions presented here directly follow from, and compare in magnitude to, those presented in *Ex parte Quirin*, 317 U.S. 1 (1942), *Youngstown Sheet & Tube Co.* v. *Sawyer*, 343 U.S. 937 (1952), *Reid* v. *Covert*, 357 U.S. 1 (1957), and *Wilson* v. *Girard*, 354 U.S. 524, 526 (1957). In all of these cases, the Court granted certiorari before judgment. It would be hard to devise a case that more clearly warrants certiorari before judgment under this Court's traditions and the Expediting Act, 28 U.S.C. §1254(1) and §2101(e), than this one.

---

[1] In addition to the *amici* who have filed briefs in this Court, eighteen different entities filed *amicus* briefs in the Court of Appeals in support of affirming the decision below. These briefs are available at http://www.law.georgetown.edu/faculty/nkk/publications.html#h. Petitioner has asked the Court of Appeals for hearing *en banc* if certiorari before judgment is denied. That Motion is available on the same website.

3. *Quirin*, Respondents' leading case, confirms that certiorari before judgment is appropriate here. Pet. 7-8. In *Quirin*, the Court ordered the case heard at the *defendants'* request due to the "*public importance* of the questions raised" and "because *in our opinion* the public interest required that we consider and decide those questions without *any avoidable delay*." 317 U.S. at 19 (emphasis added).

The Government's efforts to distinguish *Quirin* on the facts are unavailing. Contrary to the Government's suggestions (Br. Opp. 13-15), (1) the Court did *not* grant review in *Quirin* after the District Court "denied" the defendants' Petition, but instead granted review before the District Court acted;[2] (2) the defendants did *not* face imminent execution when the Court granted review, instead they had not even been found guilty by the commission;[3] and (3) the Court did *not* place any weight on the citizenship of the defendants, six of seven of whom were in any event German, 317 U.S. at 20, 37-38.

Respondents' efforts to avoid *Quirin* based on subsequent case law are equally unavailing. Respondents argue (at 14) that *Schlesinger* v. *Councilman*, 420 U.S. 738 (1975) had not been decided. But *Councilman* did not undercut *Quirin*'s emphasis on the "public interest" warranting immediate review or announce an abstention rule different from that in place during *Quirin*. *See id.* at 754-56; *Younger* v. *Harris*, 401 U.S. 37, 45-46 (1971); *In re Grimley*, 107 U.S. 147 (1890); *Reaves* v. *Ainsworth*, 28 App. D.C. 157 (1906). And also contrary to Respondents' assertion (at 13-14), *Hamdi* v. *Rumsfeld*, 124 S. Ct. 2633 (2004), did *not* make the legality of the commissions challenged here clearer – and therefore less certworthy – than that of those challenged in *Quirin*. Respondents themselves acknowledge that the Geneva Convention and UCMJ issues presented here "are all novel." Br. Opp. 10.[4] In any event, Respondents' claim

---

[2] *See* Bittker, *The World War II German Saboteurs' Case and Writs of Certiorari Before Judgment by the Court of Appeals*, 14 Const. Comment. 431, 446-51 (1997); Danelski, *The Saboteurs' Case*, 1 J. S. Ct. Hist. 61 (1996).

[3] *Id.*

[4] The Petition's first question, which is essentially the same as Respondents' Questions 2-4, asks whether the Geneva Conventions provide a judicially enforceable rule of decision. The Government has told the D.C. Circuit that other Courts of Appeal have repeatedly confronted

favors certiorari, for only this Court can determine the meaning and reach of *Quirin* and *Hamdi*. *See Rodriguez de Quijas* v. *Shearson/American Express*, 490 U.S. 477, 484 (1989).

4. Whatever weight the views of the Solicitor General might be accorded in other contexts, here, as Respondent,[5] he has already stated in the strongest terms the importance of the questions presented. As the *amicus* briefs underscore, Petitioner's contention regarding the need for this Court's immediate resolution is widely shared.

The Government suggests that appellate review may clarify the issues, analogizing this case to the detention cases *Hamdi* and *Rasul*. But the questions presented do not concern the President's power to detain enemy combatants. In assessing detention, judicial incrementalism and lower-court percolation are appropriate to prevent shackling the Executive. The test of *Mathews* v. *Eldridge*, 424 U.S. 319 (1976), contemplated in *Hamdi*, 124 S. Ct. at 2648-52 (plurality), for example, involves mixed questions of fact and law that inherently lend themselves to careful evaluation by lower courts of the specific circumstances in a given case.

This case, however, is entirely different. It presents pure questions of law. The lawfulness of the means by which the President has conjured these new tribunals and of the procedures those tribunals employ are questions within the particular expertise and ultimate authority of this Court.[6]

---

this general issue. Pet. App. 51. The Petition's other question concerns the interpretation and reach of this Court's decisions in *Quirin*, *Councilman*, and *Hamdi*, as well as *Ex Parte Milligan*, 71 U.S. (4 Wall.) 2 (1866); *Duncan* v. *Kahanamoku*, 327 U.S. 304 (1946); *In re Yamashita*, 327 U.S. 1, 7 (1946), *Madsen* v. *Kinsella*, 343 U.S. 341 (1952), and *Reid* v. *Covert*, 354 U.S. 1 (1957).

[5] *Cf.* U.S. Br. Opp., *Rasul* v. *Bush* and *Al Odah* v. *United States*, Nos. 03-334 and 03-343, at 19 (opposing certiorari because "[t]he potential for interference with the core power of the President in this litigation is therefore even more acute in this case than it was in *Eisentrager*."), *cert. granted* 540 U.S. 1003 (2003); U.S. Br. Opp., *Hamdi* v. *Rumsfeld*, No. 03-6696, at 15-17 (similar), *cert. granted*, 540 U.S. 1099 (2004).

[6] Cases like *Yamashita*, *supra*, cited by Respondents (at 12) have no relevance. Those cases concern battlefield commissions, not commissions established years later and operating outside a theater of war. Those cases also implicate specific-deterrence interests ("incapacitation"), which are not at issue here because the Government has the power to detain enemy combatants without commissions. Br. Opp. 8-9.

And should Petitioner ultimately prevail, unlawful combatants would still be triable by courts-martial, Article III courts, and commissions set up by Congress. (Congress has expressly provided that violations of the laws of war are triable in courts-martial. *See* 10 U.S.C. §818.)

This Court has preempted percolation among the courts of appeals by concentrating all Guantanamo habeas litigation in the D.C. Circuit. Pet. 13. Even within that single Circuit, all other commission cases are in abeyance pending *Hamdan*'s final resolution. Reply App. 1-4. Only a prompt resolution of the questions presented by *this* Court can deliver the requisite finality. The questions presented are squarely raised in this case, making it an ideal vehicle for their resolution.

5. The Government also contends that the Court might avoid the questions presented if the commission proceedings are allowed to run their course. It speculates that the Court of Appeals may reverse the District Court's decision that *Schlesinger* v. *Councilman*, 420 U.S. 738 (1975), does not require abstention. This scenario seems unlikely, but, if anything, it militates in favor of granting the Petition.

In the first place, even if Respondents' scenario played out in full and the commission *acquitted* Petitioner, that would not end the matter: The Appointing Authority and Review Board could send the case back to the commission; and even if Petitioner were ultimately acquitted by the Appointing Authority and the President, commission rules permit Respondents to try Hamdan again on other offenses (such as conspiring to commit some other offense, or even aiding and abetting the *same* object offenses for which he is currently charged). 32 C.F.R. §9.5(p). As long as the Military Order stands, Respondents can subject Petitioner to new trials, *ad infinitum*. *Cf. Spencer* v. *Kemna*, 523 U.S. 1, 18 (1998) ("capable of repetition, yet evading review").

Second, *Councilman* emphasized that in creating the modern court-martial, Congress carefully balanced military needs against procedural fairness. *Id.* at 758-60. It is precisely this system that Respondents now reject. Hamdan's commission thus lacks the factual predicate for abstention, a system "established by Congress and carefully designed to protect not only military interests but [the defendant's] legitimate interests as well." *Id.* at 760.[7] Should

[7] *Councilman*'s formulation of "interests" tracks military law, where constitutional rights are often minimal or nonexistent. Respondents

a lower court extend *Councilman* to commissions, it must first find that the tribunals are congressionally authorized and fundamentally fair. A court decision to abstain, far from militating against certiorari, would magnify the need for it. This is particularly so because Petitioners' presence rights have *already* been violated in the commission. Pet. App. 27.

Even under the *Councilman* framework, abstention is an equitable doctrine that requires balancing the legal interests at stake. It is this Court and not a lower court that should perform that task, and sooner rather than later. The trials of Petitioner and other commission defendants pose some of the most pressing and momentous issues of our times. Pet. 8 (quoting *Milligan, supra*). These trials should not be allowed to proceed under a legal cloud; if their design is unlawful, this Court should make that clear so that trials by legally competent tribunals can begin. Alternatively, if these commissions can go forward, they should do so with this Court's imprimatur. Waiting to decide the legality of the commission process, with the possible result that convictions will need to be undone and defendants retried, serves no compelling interest and is contrary to the goals of efficiency and finality. *See Teague* v. *Lane*, 489 U.S. 288, 309 (1989).

Indeed, if the Court of Appeals interpreted *Councilman* as Respondents suggest, that new rule would have dramatic reverberations. To take just one example, it would give the Government the ability to evade for years habeas review of any and all detainee cases by designating the detainees eligible for commissions, a step that would eviscerate *Rasul, supra*. *See* Golden, *After Terror, A Secret Rewriting of Military Law*, N.Y. Times, Oct. 24, 2004, at 1 (stating that the Counsel to the Vice President at one point "urged" the White House Counsel to seek a blanket designation of all the detainees being sent to Guantanamo as eligible for trial under the president's [November 13, 2001 military] order" and that the White House Counsel "agreed").

6. The Government also tries to analogize the Petition to a criminal interlocutory appeal. Yet "the interlocutory status of the case may be no impediment to certiorari where the opinion of the court below has decided an important issue, otherwise worthy of review, and Supreme Court

---

nonetheless claim (at 16) that Hamdan lacks constitutional rights since he has "no voluntary ties to the United States." This position, aside from ignoring the "ties" the *Government* has created by seizing and detaining for years a person who claims to be an innocent civilian, has already been considered and rejected. *Rasul* v. *Bush*, 124 S. Ct. 2686, 2698 & n.15 (2004).

intervention may serve to hasten or finally resolve the litigation." Robert L. Stern, et al., *Supreme Court Practice* 260 (8th ed 2002); *id.*, at 259-60 (citing eighteen cases of this Court, including the UCMJ case *Solorio* v. *United States*, 483 U.S. 435 (1987), which overruled the service-connection test at issue in *Councilman*, *supra*). When *Respondents* desired similar "interlocutory" review in *In re Cheney*, where separation-of-powers questions were threshold issues, Respondents stated it would serve no purpose to require the proceedings below to run their course before granting review. U.S. Pet. 23-24, *In re Cheney*, No. 03-475; U.S. Reply Br., No. 03-475, at 15. Such a requirement would likewise serve no purpose here.

7. On the other side, the arguments for this Court to hear this matter now are compelling. Because oral argument in this case has been scheduled for March 8, this Petition should be granted to avoid a crisis of legal uncertainty that will becloud the commissions for many months. Were this a case that might be expected to "go away" following the decision of the Court of Appeals, denying the Petition to obtain appellate guidance might be appropriate. But given the gravity of the issues presented, a gravity Respondents themselves have emphasized, this is not that case.

Mr. Hamdan has waited for over three years to have a fair trial. Throughout this time, he has languished in detention, deprived of his liberty and access to his wife and children.[8] As *amici* have pointed out, the danger to him, and others like him, from continuing delay underscores the importance of the issues presented, as well as the need to

---

[8] The Government (at 8) mischaracterizes Hamdan's federal-court petition. The lawfulness of Petitioner's detention as an "enemy combatant" will be academic if Petitioner may be imprisoned as a defendant before a military commission. In his habeas petition, therefore, Petitioner seeks to resolve the lawfulness of his detention as an "enemy combatant" *if* his challenge to the commission succeeds. *See* Habeas Petition, *Hamdan* v. *Rumsfeld*, No. 04-1519, D.D.C., Prayer for Relief, ¶7-10.

Invalidation of the military commission process would also clear the way for Petitioner's evaluation and release by the Annual Review Board procedure that the Government has established. *See* Special Defense Department Briefing on Status of Military Tribunals, Dec. 20, 2004, at http://www.defenselink.mil/transcripts/2004/tr20041220-1841.html. Hamdan, and others like him, cannot receive the benefit of these annualized reviews until the commission process is concluded.

move this case toward final resolution as soon as possible.

8. In arguing for reversal on the merits, Respondents contend that federal courts may not review the President's interpretations of treaties, his determinations of the status of individuals as unlawful belligerents, and any procedures he may establish to try alleged violations of the laws of war. This argument is contrary to the letter and spirit of *Hamdi* and *Rasul* and, if accepted, would overturn two centuries of decisions of this Court, including decisions overruling Executive Branch interpretations of treaties and requiring Executive Branch compliance with those treaties as judicially construed. Only this Court can decisively repudiate Respondents' extravagant claim of Executive prerogative. This Court has long exercised its jurisdiction to evaluate the legality of constitutionally extraordinary actions taken by the President, Congress, and lower courts. *E.g., Rasul, supra; Clinton* v. *City of New York,* 524 U.S. 417 (1998); *Clinton* v. *Jones,* 520 U.S. 681 (1997); *Reid, supra; Youngstown, supra.* The Court should exercise such jurisdiction here.

a. In interpreting the Third Geneva Convention ("GPW"), the District Court did not usurp Executive Branch authority but performed its Article III duty to declare and enforce "the supreme Law of the Land." See Pet. 19-20; *The Head Money Cases,* 112 U.S. 580, 598-99 (1884) (holding treaties judicially enforceable when they "prescribe a rule by which the rights of the private citizen or subject may be determined"); *Doe* v. *Braden,* 57 U.S. 635, 657 (1853); *Kolovrat* v. *Oregon,* 366 U.S. 187 (1961); *Jordan* v. *Tashiro,* 278 U.S. 123 (1928); *Asakura* v. *City of Seattle,* 265 U.S. 332 (1924); *United States* v. *Percheman,* 32 U.S. (7 Pet.) 51 (1833).

The District Court's ruling that the GPW extends to Petitioner and is judicially enforceable gives effect to the text of the pertinent treaty provisions and the treaty's ratification history. In so ruling, the District Court applied the GPW in a manner consistent with United States military practice since World War II, a practice that has been and remains essential to the protection of the men and women of the American Armed Services captured in conflicts abroad. Pet. App. 15.

The Government's claim that the GPW is not "judicially enforceable" ignores its ratification history and the fact that the treaty has long been given effect – and codified – by federal statutes and regulations. The positive federal law

giving the GPW effect obviates the need to consider whether, in the absence of such law, the President's Military Order violates the Suspension Clause. See *Hamdi*, 124 S. Ct. at 2650 (plurality opinion) (citing *INS* v. *St. Cyr*, 533 U.S. 289, 301 (2001)); *Ogbudimka* v. *Ashcroft*, 342 F.3d 207, 220-21 (C.A.3 2003); *Ashwander* v. *TVA*, 297 U.S. 288, 346-347 (1936) (Brandeis, J., concurring).

The Government claims (at 20) that the Combatant Status Review Tribunals ("CSRTs") satisfy the GPW's Article 5 requirement that a detainee's POW status be determined by a "competent tribunal." But the Government has stated that CRSTs are *not* Article 5 tribunals. DoD Background Briefing on the Combatant Status Review Tribunal, http://defenselink.mil/transcripts/2004/tr200407070981.html. As the District Court noted, Respondents have admitted that the CSRTs do not determine POW status but simply decide "whether the detainee is properly detained as an enemy combatant." Pet. App. 13 (citations omitted).

b. The Government's argument that 10 U.S.C §836 does not require Petitioner to be tried under court-martial procedures also misses the mark. The District Court's reading of section 836 is not only faithful to the text of the statute but also accords with historical practice: Even before the enactment of the UCMJ, military commissions generally followed the same procedures as courts-martial. *See, e.g.*, W. Winthrop, *Military Law and Precedents* 841 (2d ed. 1920).

In providing that the rules for military commissions "may not be contrary to or inconsistent with" the UCMJ, §836 codified that longstanding tradition. The statute, as interpreted by the District Court, does not require that all rules for courts-martial and commissions be identical, and it does not in any way encroach on the President's war powers.[9] Rather, the statute simply recognizes that the confrontation right and the right to be present at all stages of trial are fundamental. It is for that reason that the UCMJ guarantees these rights in courts-martial and commissions. Such rights are universally recognized as inviolable under common law, military law, and international law. As the

---

[9] U.S. Const., Art I, §8 gives Congress the power to "define and punish . . . Offences against the Law of Nations." There is no doubt about Congress's authority to legislate in this area.

Court long ago observed, "[a] leading principle that pervades the *entire* law of criminal procedure is that, after indictment found, *nothing* shall be done in the absence of the prisoner," for the right to be present is of "peculiar sacredness," and necessitated by the "dictates of humanity." *Lewis* v. *United States*, 146 U.S. 370, 372, 375 (1895) (emphasis added). The integrity of American justice, and the honor of its judicial institutions, demand that these rights be respected. See *Crawford* v. *Washington*, 124 S.Ct. 1354, 1363 (2004); Amicus Br. of Noah Feldman, in *Hamdan* v. *Rumsfeld*, No. 04-5393 (C.A.D.C.) (Iraqi tribunal provides as "minimum guarantees" that the accused will be "tried in his presence").

9. These issues will not be "narrowed" by intermediate appellate review, for whatever that court decides, the questions presented will remain. Respondents have done everything possible to evade this Court's review of its commissions, from setting them up at Guantanamo to changing their rules mid-stream. These maneuvers and rule changes only highlight the commissions' legal defects, all of which are rooted in Respondents' insistence that all limitations on Executive Branch power disappear whenever the President utters the magic words "military commissions." Until this Court clarifies that such limitations do exist, a question specifically reserved by *Quirin*, 317 U.S. at 29, 47, corrosive questions about the lawfulness of the commissions will continue to fester.[10]

CONCLUSION

For the foregoing reasons as well as those set forth in the Petition, the Petition for a Writ of Certiorari Before Judgment should be granted.

RESPECTFULLY SUBMITTED,

---

[10] In this case, review by the federal judiciary is already under way and cannot (and should not) be avoided. The challenge is to get it right on the merits. *See Korematsu* v. *United States*, 323 U.S. 214, 246 (1944) (Jackson, J., dissenting); Chief Justice Burger, Annual Report on the State of the Judiciary, 62 A.B.A. J. 443, 444 (1976) ("any case decided in any district court with a genuine need for swift review by the Supreme Court can be the subject of a petition for certiorari before judgment" and "[n]o one can accurately point to a case in which the Supreme Court has failed to give expedited review when circumstances warranted that action").

Lieutenant Commander
Charles Swift
Office of
Military Commissions
1931 Jefferson Davis Hwy.
Suite 103
Arlington, VA 22202
(703) 607-1521

Neal K. Katyal
Counsel of Record
600 New Jersey Ave., NW
Washington, DC 20001
(202) 662-9000

Benjamin S. Sharp
Harry H. Schneider
Joseph M. McMillan
Kelly A. Cameron
Charles C. Sipos
David R. East
PERKINS COIE LLP
607 14th St., NW
Washington, DC 20005
(202) 628-6600